Supreme Court, U.S.
FILED
DEC - 7 1993
OFFICE OF THE CLERK

NO. 93-675

In the Supreme Court of the United States

OCTOBER TERM, 1993

CYNTHIA KELLEY, INDIVIDUALLY
AND ON BEHALF OF HER MINOR CHILDREN
JERRED SETH KELLEY AND
CINDY LYNN KELLEY
PETITIONERS

versus

INDUSTRIAL REFRIGERATED SYSTEMS, INC.,
RESPONDENT

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

SUPPLEMENTAL APPENDIX

HENRY L. KLEIN, ESQ.
844 Baronne Street
New Orleans, LA 70113-1103
(504) 586-9971

Attorney for
Petitioners-Applicants

OF COUNSEL:
HEISLER & WYSOCKI

A B Letter Service, Inc., 327 Chartres St., New Orleans, La. (504) 581-5555

TABLE OF CONTENTS

Page

Appendix L A-1

Appendix M A-12

Appendix N A-16

APPENDIX L

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

CYNTHIA ANN KEEELY, ET AL	*	CIVIL ACTION
VERSUS	*	NO. 88-2862
PRICE-MACEMON, INC., ET AL	*	SECTION "K"

* * * * * * * * * * * * * * * * * * *

FILED
APR 11 9:25 AM 91

PRE-TRIAL MEMORANDUM REGARDING THE APPLICATION OF THE *"JET WHEEL DOCTRINE"* AND IN SUPPORT OF IN LIMINE MOTION TO STRIKE DEFENSES

MAY IT PLEASE THE COURT:

This pre-trial memorandum is devoted solely to the question of whether or not the "*Jet Wheel Doctrine*" is applicable, as enunciated by the Fifth Circuit Court of Appeals in the matters of *Bell v. Jet Wheet Blast, Division of Ervin Industries,* 709 F.2d 6 (5th Cir., 1983), Certified to the Louisiana State Supreme Court at 717 F.2d 181 (5th Cir.,1983), Rendered 755 F.2d 1146 (5th Cir., 1985), and as

enunciated, on certification by the Louisiana State Supreme Court, in *Bell v. Jet Wheel Blast, Division of Ervin Industries,* 462 So.2d 166 (1985), copies of which are annexed hereto for the convenience of the Court.

Because this case involves a hazard so devastating, so capable of mutilation, and so unforgiving, we believe it is one of those cases to which the "*Jet Wheel Doctrine*" applies, and as to which defenses based on "victim fault" are simply not available.

We therefore move, *in lime,* to strike all defenses alleging "victim fault", including contributory, negligence, comparative negligence and assumption of risk.

1. The Holding of the *"Jet Wheel Doctrine",* simply stated, the "*Jet Wheel Doctrine*" recognizes that in products case, where strict liability theories apply,[1] Louisiana does *not* recognize contributory negligence as a defense. See Also, *Products Liability,* 85 West's Federal Practice Digest 3rd, 94 and 95, annexed hereto, and cases cited therein: *Lewis v. Timco, Inc.,* 697 F.2d 1252, on rehearing 716 F.2d 1425[2] on remand 736 F.2d 163, rehearing denied 744 F.2d 94 and *Timco, Inc. v. Joy Mfg.,* 744 F.2d 94;

---

[1] See discussion of Industrial's liability under 402A of the Restatement of Torts 2nd., *infra.*

[2] On rehearing *en banc,* the entire Court struggled with the issue, and, noting that it had certified the question to the Louisiana Supreme Court in *Bell v. Jet Wheel, supra,* the Fifth Circuit nevertheless held, by a vote of 11 to 3, that comparative negligence *was* available as a defense to a products liability case, where such application would "...not frustrate a dedicated policy of Louisiana..." 716 F.2d 1425 at 1432.

Ashland Oil, Inc. v. Miller Oil Purchasing Co., 678 F.2d 1293; *Alford v. Pool Offshore Co.*, 661 F.2d 43; *LeBoeuf v. Goodyear Tire & Rubber Co.*, 623 F.2d 985; *Rodrigue v. Dixilyn Corp.*, 620 F.2d 537, certiorari denied 101 S.Ct. 923, 449 U.S. 1113, 66 L.Ed.2d 842; *Khoder v. AMF, Inc.*, 539 F.2d 1078.

Because contributory negligence is not available, the defense typically raised in a dangerous or defective product case is the defense of "assumption of risk", which carries a higher burden of proof, as clearly held by the 5th Circuit in the first[3] *Jet Wheel* decision:

> [1] It is well established in Louisiana law that contributory negligence is not a defense to strict liability. *Langlois v. Allied Chemical, Inc.*, 258 La.1067, 249 So.2d 133, 140 (1971). Appellant relies upon the citation of several intermediate appeals decisions in Louisiana courts which if taken out of context seem to equate assumption of risk with contributory neglignece. The distinction, however, is clearly analyzed and explained by our brother Tate, a distinguished Louisiana jurist, who discusses the issue thoroughly in *Rodrigue v. Dixilyn Corp.*, 620 F.2d 537 (5th Cir. 1980). *That case points out that assumption of risk involves "first, knowledge and appreciaation of a danger, and second, a voluntary encountering*

(Footnote 2 continued)

Timco, , however, was decided September 27, 1983 and the Louisiana Supreme Court decision in *Jet Wheel* was decided January 14, 1985.

[3] 709 F.2d 6, at 7.

> of it." ***In contrast, "The essence of contributory negligence is simply carelessness."*** Id. at 539, quoting Crowe, The Anatomy of a Tory, 22 Loyola L.Rev. 903, 915 (1976).
>
> (Emphasis Ours)

But even "assumption of risk", is not automatically available. The teaching of the "*Jet Wheel Doctrine*" is that assumption of risk, pleaded *sub nomine* "comparative negligence", is *not* available in cases where the use of the defense results in the reduction of a manufacturer or seller's "...incentive to make a safer product..." 462 So.2d at 172.

In *Jet Wheel, supra*, the plaintiff was injured when his hand was caught in the chain and sprocket drive of a conveyor system of the machine because "...of the lack of an adequate guard at the particular place on the drive where the injury occurred..." 462 So.2d. at 172.

The Court held that neither contributory negligence *nor* assumption of risk applied, because of the social need *not* to allow suppliers of defective products to profit from user inadvertence. The Supreme Court's words begin at 171, thus:

> "The recovery of a plaintiff who has been injured by a defective product *should not be reduced*, however, *in those type of cases* in which it does not serve realistically to promote careful use or where it drastically *reduces the manufacturer's incentive to make a safer product.*

We believe this is such a case. The lethality of the

auger in question does not justify the imposition of any "user responsibility". As the Supreme Court said, at 172:

> "...the law does not accept the employee's ability to take care of himself *as an adequate safeguard of interests which society seeks to protect.*"

Thus, the doctrine stands for the proposition that, *in certain cases,* no diminution by way of "victim fault" is allowed. This decision must be made on a case-by-case basis, by the Court.

Not by a jury.

We believe this is such a case, and therefore move, *in limine,* to strike all defenses based on victim fault, whether couched in terms of negligence or assumption or risk.

In connection with the question of lethality, and in order that the Court can be apprised of the social issues involved, as is required by the "*Jet Wheel Doctrine*" we annex hereto a copy of the report of J.B. Sevart, P.E., including two papers presented to the American Society of Agricultural Engineers, given long before this accident occurred, entitled *Application of Interlocks, Deadman Controls and Emergency Stop Devices as Design Strategy to Reduce Risk Associated with Agricultural Machinery* (March 19, 1982, and *Reducing Risk of Bottom Unloaders by Control System Design* (April 12, 1985).

After noting that Agriculture is the most dangerous occupation in the United States, as measured by the National Safety Council's 1981 edition of "Accident Facts",

Mr. Sevart notes:

> "It is most foreseeable that boredom, fatigue, worry, inexperience, and a host of other factors deny the existence of a perfect operator. Further, what control does the machine designer have over the operator? When a designer assumes conditions which are not true, failure of the design will occur and serious injury is foreseeable." March 19, 1982 at Page 3.

Given that the "system" was sold to a user in humid, hot South Louisiana, the foreseeability that an operator would be required to enter the silo to "unfreeze" ice was high indeed. After all, it was Industrial which selected a silo from Rochester, which, although insulated adequately, was not refrigerated.

This is not a case where the component parts failed, but rather a case in which the "system" (which Industrial Refrigerated Systems, Inc. provided) failed.

What might have worked in upper New York State didn't work on Bayou Lafourche.

That was foreseeable.

2. Industrial's Posture: Seller, manufacturer, or Supplier.[4] Industrial says it was a "broker"[5] which merely

---

[4] In order to properly decide whether or not the *"Jet Wheel Doctrine"* applies, it is necessary to analyze Industrial's posture in the case.

[5] Paragraph 6(b), pre-trial order.

"supplied" the component parts which made up the "system" it sold to the Demere family and their respective corporations.

Because most cases involve manufacturers, it is therefore important and relevant to analyze Industrial's posture in this litigation.

Clearly, Industrial did not manufacture any of the component parts. Rather, it assembled refrigeration systems, or "Ice Plants". It's letterhead boasts:

"Ammonia & Freon Refrigeration Specialists"

And indeed what Industrial supplied was a turn-key "system". That's why they put the work in their name: Industrial Refrigerated **Systems.**

As Mr. Wayland Demere put it, at p. 24 of his deposition:

"And they made it sound so good. Just sit in a chair and press a button and everything was going to work perfect."

At the January 5, 1987 meeting about which Mr. Demere spoke, Industrial received a check for $50,000, payable to Industrial Refrigerated Systems. On April 20, 1987, the South LaFourche Bank & Trust Company wired $202,000 to the account of "Industrial Refrigerated Systems" at the FNBC. (Copy annexed).

Having received the pu.chase money and having

supplied a complete system, there is no doubt that Industrial was a "supplier of chattels". By its own pleadings, Industrial was certainly a "seller". And because of the representations made at the January 5, 1987 meeting, Industrial can be held accountable as a "manufacturer". Under any of the above categories, we believe, the "*Jet Wheel Doctrine*" applies.

The appropriate rules for determining the liability of Industrial are contained in Chapter 14 of the Restatement of Torts 2nd, entitled *Suppliers of Chattels,* which provide as follows:

> **§400. Selling as Own Product Chattel Made by Another**
>
> One who puts out as his own product a chattel manufactured by another is subject to the same liability as though he were its manufacturer."

It will, of course, be left to the jury to decide whether, under the circumstances of this case, Industrial represented the "system" as its own product. Clearly, Industrial presented itself as a refrigeration "specialist" capable of putting together a "refrigeration system". Clearly, Industrial asembled and supplied the component parts.

The jury will have evidence before it to justify a finding that Industrial must respond as a manufacturer, in which case it will be held strictly liable for the death of Jack Kelley.

If the representations made on January 5, 1987, do not result in a finding that Industrial stands in the shoes of a manufacturer, then Industrial is a seller, whose liability is determined pursuant to Section 402 A of the Restatement of Torts, which provides as follows:

> **§402 A. Special Liability of Seller of Product for Physical Harm to User or Consumer**
>
> (1) One who sells any product *in a defective condition unreasonably dangerous to the user* or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if
>
> (a) the seller is engaged in the business of selling such a product, and
>
> (b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.
>
> (2) the rule stated in Subsection (1) applies although
>
> (a) the seller has exercised all possible care in the preparation and sale of his product, and
>
> (b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.

As the testimony of Mr. Sevart will show, the Orbital Ice Storage System manufactured by Rochester-Silo was defectively designed.

Thus Industrial is strictly liable as the "seller" of a defective product, particularly in view of the fact that In-

dustsrial was "...engaged in the business of selling such a product..."

The Louisiana Supreme Court, in deciding the certified question, at 462 So.2d 171, recognized the applicability of Section 402 A of the Restatement of Torts 2nd, as well as the need for a rule of strict liability, holding:

> "As were most American courts, we were influenced in our objective search for a products liability rule by the doctrine that culminated in the adoption of Section 402A of the Restatement Second of the Law of Torts, which has received a wide national acceptance. The basic goals of the strict products liability doctrine appear to be: (a) the reduction of the incidence of injuries by providing an incentive for manufacturers to produce safer products; (b) the placing of the burden of accidental injuries caused by defective products on those who market them, to be treated as a cost of production against which liability insurance can be obtained."

The criteria set forth by the Louisiana Supreme Court, pursuant to the certification of the Fifth Circuit Court of Appeals, requires that, under the facts of this case, the *Jet Wheel Doctrine*" must be applied.

Accordingly, the question of "victim fault" should not go to the jury and the defenses should be stricken.

Respectfully submitted,

/s/ Henry L. Klein

HENRY L. KLEIN (#7440)
844 Baronne Street
New Orleans, LA 70113-1103
(504) 561-1177

CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing pleading has been served on all counsel of record by depositing same into the United States Mail, properly addressed and postage prepaid on this 1st day of March, 1991.

/s/ Henry L. Klein

APPENDIX M

MINUTE ENTRY
ARCENEAUX, J.
MAY 20, 1991

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

CYNTHIA ANN KEEELY, ET AL	**CIVIL ACTION**
VERSUS	**NO. 88-2862**
PRICE-MACEMON, INC., ET AL	**SECTION "K" (1)**

FILED
MAY 11 4:49PM '91

Plaintiffs filed a pre-trial motion in the above-captioned matter and requested that the Court strike defenses alleging "victim fault," including contributory negligence, comparative negligence, and assumption of risk. In an opposition filed by defendant Industrial Refrigerated Systems, Inc. ("Industrial"), this defendant argues that the Court should deny plaintiffs' motion in its entirety. Having reviewed the plaintiffs' support, the opposition filed by Industrial, and the applicable law, the Court, however, finds the motion to have some merit.

DATE OF ENTRY MAY 20 1991

Plaintiffs based this motion on the Supreme Court of Louisiana's decision in *Bell v. Jet Wheel Blast,* 462 So. 2d 166 (La. 1985), in which that court answered a question of law certified to it by the U.S. Court of Appeals for the Fifth Circuit. *See Bell v. Jet Wheel Blast,* 717 F.2d 181 (5th Cir. 1983). More specifically, the Fifth Circuit posed the following question: "Does the Louisiana Civil Code permit the defense known as contributory negligence to be advanced to defeat or mitigate a claim of strict liability based upon a defective product, the theory of liability commonly known as 'product liability'?" *Id.* at 183. The Supreme Court of Louisiana answered this question in the negative but noted that the application of comparative negligence may be appropriate in some cases. *Bell,* 462 So. 2d at 173; *see Bell v. Jet Wheel Blast,* 755 F.2d 1146, 1148 (5th Cir. 1985). This holding developed into the theory of law known commonly as the "*Jet Wheel* Doctrine" in Louisiana jurisprudence.

Plaintiffs seek application of the "*Jet Wheel* Doctrine" to preclude any defenses alleging contributory negligence, comparative negligence, and/or assumption of risk. The Court finds plaintiffs' argument with respect to contributory negligence to fall within the "*Jet Wheel* Doctrine." Thus, as a matter of law, the defense of contributory negligence will not be permitted to the extent that this cause of action lies in strict liability.

The Court, however, must reserve judgment on the defenses of comparative negligence and/or assumption of risk. The Supreme Court of Louisiana in *Bell* noted that "the question of whether other classes of cases fall within the category to which comparative fault may apply must

be decided on a case-by-case basis." 462 So. 2d at 172. Defendant Industrial relies much on the fact that the plaintiff in *Bell* performed "a repetitive operation with a defective industrial machine as required by his employer." *Id.* According to Industrial, the *Bell* holding has not been applied beyond its facts.

The Court, however, finds Industrial's assertion to be a misreading of the law on this issue. In precluding the application of comparative negligence in certain strict liability cases, the Supreme Court of Louisiana in *Bell* noted the policy goal to promote the manufacturing of safer products. *Id* In fact, the Fifth Circuit has held recently that "it is error to assume that *Bell* gives repetitive motion a talismanic effect in the comparative fault determination." *Cates v. Sears, Roebuck & Co.*, 928 F.2d 679, 683 (5th Cir. 1991). The court further stated that such determination must be made "on a flexible case-by-case basis and not pursuant to a rigid checklist." *Id.* Based on these pronouncements and the evidence before the Court at this time, this Court finds defendant Industrial's arguments to be unpersuasive but does not stand ready to rule on this issue without a fuller presentation of the facts.

The Court, in conclusion, finds that plaintiffs' motion presents a persuasive case for striking defenses relating to "victim fault." Accordingly,

IT IS ORDERED that plaintiffs' motion to strike any defense asserting contributory negligence insofar as it relates to a cause of action based in strict liability is hereby **GRANTED**. The Court reserves judgment on the defenses of comparative negligence and/or assumption of risk.

/s/ George Arceneaux, Jr.

APPENDIX N

UNITED STATES COURT OF APPEALS

FIFTH CIRCUIT

NO. 92-3511

CYNTHIA KELLEY, individually
and on behalf of her minor children
JERRED SETH KELLEY and CINDY LYNN KELLEY

Plaintiff - Appellant

VERSUS

INDUSTRIAL REFRIGERATED SYSTEMS, INC.

Defendant - Appellee

Appeal from the United States District Court
Eastern District of Louisiana
No. 88-2862, Section "K"
Honorable George Arceneaux, Jr., Judge Presiding

PETITION FOR AND/OR SUGGESTION
OF EN BANC CONSIDERATION
OF APPELLANT
Cynthia Kelley, individually
and on behalf of her minor children
Jarred Seth Kelley and Cindy Lynn Kelley

SUBMITTED BY:

HENRY L. KLEIN, ESQ. (#7440)
844 Baronne Street
New Orleans, LA 70113-1103
(504) 586-9971

Attorney for Cynthia Kelley

OF COUNSEL:
HEISLER & WYSOCKI

TABLE OF CONTENTS

PAGE:

Table of Contents i

Certificate of Interested Parties ii

Statement of Counsel iii

Table of Authorities iv

APPLICATION FOR EN BANC CONSIDERATION

1. Statement of Issues Which Merit En Banc Consideration

(a) Uniformity of Decisions 1

(b) Questions of Exceptional Importance . . . 1

2. Statement of the Course of Proceedings and Disposition of the Case 3

3. Statement of Facts Necessary to Argument of the Issues 5

4. Argument and Law 11

5. Conclusion 15

6. Certificate of Service 16

CERTIFICATE OF INTERESTED PERSONS

Undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the Judges of this Court may evaluate possible disqualification or recusal.

Ms. Cynthia Kelley
P. O. Box 12
Fort McCoy, Florida 32134

Industrial Refrigerated Systems, Inc.
1411 South Houston Road
Pasadena, Texas 77502

Rochester Silo Industries
a/k/a RSI Industries, Inc.
7010 Dresser Drive N.E.
Rochester, Minnesota 55904

Truck Insurance Exchange
P.O. Box 6386
Beaumont, Texas 77705

Mr. David McGowan and
Ms. Linda McGowan
1411 South Houston Road
Pasadena, Texas 77502

CERTIFICATE OF INTERESTED PERSONS
(continued)

Claude E. Vassesr, Esq.
601 Poydras Street, Suite 2030
New Orleans, LA 70130

Henry L. Klein, Esq.
844 Baronne Street
New Orleans, LA 70113-1103

HEISLER & WYSOCKI
844 Baronne Street
New Orleans LA 70113-1103

Respectfully submitted:

HENRY L. KLEIN, ESQ. (#7440)
844 Baronne Street
New Orleans, LA 70113-1103
(504) 586-9971
Attorney for Cynthia Kelley

OF COUNSEL:

HEISLER & WYSOCKI

STATEMENT OF COUNSEL

1. I express a belief, based on a reasoned and studied professional judgment, that the panel decision is contrary to the following decisions of the United States Court of Appeals for the Fifth Circuit and the Supreme Court, and that consideration by the full court is necessary to secure and maintain uniformity of decisions in this Court:

(a) *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S. Ct. 2548, 91 L.Ed.2d 265 (1986).

(b) *Lavespere v. Niagara Mach. & Tool Works, Inc.*, 910 F.2d 167 (5th Cir. 1990).

(c) *Little v. Liquid Air*, 952 F.2d 841 (5th Cir. 1992), *en banc rehearing pending.*

2. I also express a belief based on reasoned and studied professional judgment that this appeal involves one or more questions of exceptional importance:

(a) Those issues presently before the en banc panel in *Little v. Liquid Air, supra*, including the applicability of the "sophisticated user" rule, the applicability of the "risk/utility" doctrine, and the applicability of the "obvious danger" rule as a bar to recovery in a state which has adopted comparative negligence.

(b) The applicability of the"Jet Wheel Blast" doctrine to machinery *nationally* renowned for its lethality.

(c) The granting of a summary judgment on grounds *not* included in the mover's statement of uncontested facts.

HENRY L. KLEIN, ESQ.

TABLE OF AUTHORITIES

PAGE:

Bell v. Jet Wheel Blast, Division of Ervin Industries, 462 So.2d 166 (1985) 3

Celotex v. Catrett, 477 U.S. 317, 106 S. Ct. 2548, 91 L.Ed.2d 265 (1986) 13

Davis v. Avondale Industries, Inc., 975 F.2d 169 (5th Cir. 1992) 2

Easton v. Chevron, 602 So.2d 1032 (4th Cir. 1991) 9

Lavespere v. Niagara Machine & Tool Works, Inc., 910 F.2d 167 (5th Cir. 1990) 1

Little v. Liquid Air Corp., 952 F.2d 841 (5th Cir., 1992) 1

Melton v. Deere & Co., 987 F.2d 1241 (5th Cir., 1989) 12

U.S. v. Lynch, 690 F.2d 213 (1982, U.S. App. D.C.) 2

1. Statement of Issues Which Merit En Banc Consideration.

(a) Uniformity of Decisions. In this products' liability case, the panel has affirmed a summary judgment on the issue of "open and obvious" danger, notwithstanding established precedent against deciding such fact issues by summary judgment. For reasons set forth hereinbelow, we believe that the panel decision is inconsistent with previous rulings by this Court in *Lavespere v. Niagara Mach. & Tool Works, Inc.*, 910 F.2d 167 (5th Cir. 1990) and *Little v. Liquid Air,* 952 F.2d 841 (5th Cir. 1992), *en banc rehearing pending.*

Additionally, because the mover did *not* certify the issue of "open and obvious" danger in its Rule 2.09 Statement of Uncontested facts, the mover did not bear its threshold burden as required by *Celotex v. Catrett,* 477 U.S. 317, 106 S. Ct. 2548, 91 L.Ed.2d 265 (1986) and its considerable progeny. to the best of our knowledge, no Fifth Circuit decision has ever allowed a fact issue *not set forth in the Rule 2.09 Certificate* to be "supplied" by the Court. Uniformity requires that a non-mover to a summary judgment be put on *clear notice* as to what fact issues are "uncontested".

(b) Questions of Exceptional Importance. We have closely monitored *Little v. Liquid Air* since it was argued before an *en banc* panel in May of 1992. The case at bar, like *Little v. Liquid Air,* would involve (had the issue been properly certified as required by Local Rule 2.09) the "sophisticated user" rule, and the applicability of the "risk/utility" doctrine. Although *Little v. Liquid Air* is a

Mississippi case, Louisiana recognizes the "sophisticated user" doctrine. *Davis v. Avondale Industries*, 975 F.2d 169 (5th Cir. 1992). The "risk/utility" doctrine is quickly becoming the nationally accepted test in products' liability cases and requires the weighing of competing facts. As the panel correctly noted at footnote 11:

> 'Although the tension between Louisiana's new pure comparative fault system and the "obvious danger rule" is clear, to date, *no Louisiana court has directly addressed the issue.*"

This is correct and warrants en banc consideration.

Secondly, the lethality of screw-type augers is a matter of national concern. We believe that the "Jet Wheel" doctrine applied and so moved, *in limine*. The District Court granted the motion but the Court of Appeals did not deal with the issue because if affirmed summary judgment. We believe that the application of the "Jet Wheel" doctrine to machinery as lethal as the auger involved herein is a matter of exceptional *societal* importance.

Finally, en banc review is available to consider an unusual case in order to cure a "gross injustice". *U.S. V. Lynch*, 690 F.2d 213 (1982, U.S. App. D.C.). This motion for summary judgment was affirmed on grounds not included in the mover's statement of uncontested facts.

2. Course of Proceedings and Disposition of the Case. On July 5, 1987, Jack Kelley was mangled to death by a screw auger at an ice plant in Golden Meadow, Louisiana. As a consequence, on July 1, 1988, Cynthia Kelley, individually and on behalf of her minor children, Jerred

Seth Kelley and Cindy Lynn Kelley, filed suit against various defendants, including Industrial Refrigerated Systems, Inc., the seller of the system and its components.

On April 11, 1991, plaintiff filed an *in limine* motion to strike defenses regarding "victim fault", pursuant to the Jet Wheel Doctrine", *Bell v. Jet Wheel Blast, Division of Ervin Industries,* 462 So.2d 166 (1985), (Excerpt 2) and on May 17, 1991, the District Court GRANTED the motion with the following language:

> "The Court, in conclusion, finds that plaintiffs' motion presents a persuasive case for striking defenses relating to "victim fault." Accordingly,
>
> **IT IS ORDERED** that plaintiffs' motion to strike any defense asserting contributory negligence insofar as it relates to a cause of action based in strict liability is hereby **GRANTED**. The Court reserves judgment on the defenses of comparative negligence and/or assumption of risk."

Trial began October 7, 1991, resulting in a jury verdict in favor of Industrial as to both manufacturer liability and seller liability. Judgment was entered accordingly (001252).

A Motion for Judgment N.O.V. or alternatively for a New Trial, was timely filed and a new trial was granted for reasons which include the following statement, which is key to the application filed herein:[1]

---

[1] Excerpt 17, Record 001779.

> "The weight of the evidence did support the fact that other persons routinely entered the ice machine to assist in ice-making operations; *other evidence placed in dispute the decedent's knowledge of the allegedly obvious danger.* More importantly, the court has viewed a photograph submitted to it during the trial, which plaintiff's counsel failed to include in the pre-trial order and never offered into evidence (Record 248), *which weighs heavily against defendant's contentions regarding the obvious danger posed by the ice machine.*"

Other reasons for granting a new trial[2] included defects in the jury charges ("...the jury however was without a proper explanation as to the duty imposed upon a seller to warn..." at 001778) and, manifest injustice ("...the court is convinced that a manifest injustice has occurred with respect to Industrial's possible liability as a seller of a dangerous product, including, specifically, the issue of this defendant's failure to warn." at 001780).

On April 10, 1992, Industrial filed a motion for Summary Judgment supported by an affidavit which essentially said that Industrial was unaware of any danger posed by the auger prior to Kelley's death. The motion was set for hearing April 29, 1992. On April 22, *one week before the scheduled hearing*[3].The Court granted the motion for sum-

---

[1] For the convenience of the members of the Court, we annex the Minute Entry granting a new trial as Appendix "A".

[3] Rule 56(c) of the Federal Rules of Civil Procedure provides that: "...the adverse party *prior to the day of hearing may serve opposing affidavits.*" Local Rule 2.07, requires the opposition to be filed 8 days prior to the date of rehearing. Because the panel considered the merits, the

mary judgment as "unopposed". Within ten days, a request for reconsideration was filed, together with a response addressing the merits of the motion. On May 25, 1992, the District Court DENIED plaintiff's motion for Reconsideration and an appeal was timely filed. Industrial cross-appealed from the order granting a new trial.

On June 15, 1993, a panel of this Court affirmed the decision of the District Court and we now suggest en banc consideration.

3. Statement of Facts Necessary to Argument of the Issues.

(a) The auger with ice. Notwithstanding the fact that Industrial did not make "obvious danger" an issue of uncontested material fact, as set forth hereinbelow, the panel decided that the danger of entanglement was so "obvious" and that the evidence was so "uncontroverted" that summary judgment was proper on this issue. Before Jack Kelley was even employed by Delton's One Stop, a demonstration of the auger took place. During the demonstration, the auger caught a steel shovel and mangled it. Jack Kelley did not see that demonstration. It is apparent, however, that the "shovel-eating incident" played a leading role in the panel's decision. With all due respect, however, there was a *substantial* difference between the auger's appearance at the "shovel-eating" demonstration

---

(footnote 3 continued)

inconsistencies, between the Federal Rule and the Local Rule were not addressed.

Nevertheless, it appears that the district court's irritation over the non-compliance with Rule 2.07 impacted consideration of the substantive issues.

and the auger's appearance when it was covered with 18 inches of ice.

For this reason, we specifically displayed to the panel, at oral argument, the photograph upon which the District Court relied in granting a new trial. The danger was not obvious:

(b) The Level of the Ice when Kelley was Killed. Consistent with the appearance of the photograph, Steve Fillimich testified that *on the day of the accident,* the ice level was "Low. About 18 inches." (Vol. 8, p. 44) He also testified that the shovelling process was required while the auger was on, otherwise, "you wouldn't accomplish nothing" (p. 45). It is clear that this evidence does indeed "weigh heavily against the defendant's contentions regarding the obvious danger posed by the ice machine," as the District Court observed in granting a new trial.

(c) The Speed of the Auger. The speed with which the auger circled the bin would also mask the hidden danger of the auger. Damas Demere, in describing how the entire ice plant was *not functioning properly,* testified about the speed of the auger, at page 75, line 13:

> "And basically the two screws are unstoppable as far as for rotating, but they would not sweep the room. *Every 20 minutes it's supposed to make a total, 360 degree lap of that room.* When the ice got hard, it simply would not advance, and the gear to do that with, to advance it, was outside the building. And you could put a wrench on it, and you put a little body weight on it, you could make it sweep into the ice. But the machine alone

wasn't capable of doing it."

Thus, the auger was sweeping the bin at a speed *slower* than 20 minutes per each 360 degrees, if at all!! By the mere fact that the auger needed assistance, it is obvious that the auger was either not moving, or moving very slowly, a fact that would dictate against the defendant's claim of open and obvious danger.

(d) The Warning Decals. The manufacturer recognized the need to warn users and provided the following warning stickers which were *not* used by the seller when the ice plant was installed:

It is inherently inconsistent to conclude that there was no duty to warn when the duty was, in fact, undertaken. And although the panel properly recognized additional basis for seller liability, independent of the "duty to warn", the failure to use the warning stickers was simply disposed of by footnote 10:

> "If the manufacturer had furnished warnings, the sellers presumably would have had knowledge of the defect, or, at the very least, *they would have been negligent in not forwarding the warnings to the consumer.*"
>
> Evidence ragarding this issue was adduced at trial:
>
> "Q. And were you aware at that time (the shovel-eating demonstration) of the existence of the type of warning decals that were received in October?

"A. I saw warning decals when I was there."[4]

Additionally, we submitted to the District Court, *before trial*, state-of-the-art literature which required the waring to be placed "next to the access door" of any structure containing an auger.[5] Indeed, it is Louisiana law that the warnings must be placed" in a manner likely to catch the user's attention..." *Easton v. Chevron*, 602 So.2d 1032 (4th Cir. 1992), at 1037.

(e) "Professional Vendor" Status. the panel found that Industrial's liability was limited to a duty to warn, which duty was absolved because the danger was obvious. At footnote 9, the panel recognized that such a rule does not apply to a "professional vendor". This is correct. We respectfully submit that the panel erred, however, in concluding that:

> "...Because Kelley does not seek recovery under either of these two theories[6], we need not concern ourselves with the details."

We *did* rely on the "professional vendor" doctrine. Indeed, Industrial *was* in the "business" of selling ice plants and we often made the point. Testimony was adduced to show that Industrial was a "professional vendor"[7],

---

[4] David McGowan, Excerpt 16, pg. 34.

[5] *Application of Interlocks, Deadman Controls and Emergency Stop Devises As a Design Strategy to Reduce Risk Associated with Agricultural Machinery*, J. B. Sevart, 3/19/82 (000888, Excerpt 2).

[6] (a) Holding oneself out as a manufacturer and (b) professional seller.

[7] *David Easley*, at 346 *et seq; David McGowan*, at 304 *et seq; Lawrence Olinde*, at 265 *et seq.*

and we often emphasized that Industrial's letterhead described the company as:

**"AMMONIA & FREON
REFRIGERATION SPECIALISTS".**

It was specifically with the "professional vendor" issue in mind that we conducted the following cross-examination of David McGowan, Vol. 7, at page 31:

"Q. I asked you whether you were *in the business of selling* refrigeration and ice equipment.

A. *That is correct.*

Q. Refrigeration and ice equipment that is necessary to put into an ice plant?

A. *That's correct.*

In our jury charges, we submitted a specific jury charge on the issue; in our motion for judgment n.o.v., we again specifically relied on liability vested upon "professional vendors" (Excerpt 15, 001155); in our original brief to the panel, we made specific reference, at page 8, to the fact that Industrial held itself out to be "Refrigeration Specialists", detailing at footnotes 4 through 11, the testimony of various witnesses regarding the "sales pitch" made to the unsophisticated Demere family; in our reply brief to the panel, at page 1, we specifically challenged Industrial's statement that they were not a "professional vendor".

Obviously, *we did rely upon a theory of liability on the*

part of Industrial as a "professional vendor" and the panel's conclusion to the contrary is clearly erroneous. It is respectfully submitted that the factual issues regarding Industrial's status as a "professional vendor" precluded summary judgment, as did questions of fact regarding "obvious" danger.

4. Argument on Issues Raised for En banc Consideration.

(a) Uniformity of Decisions. Rule 35(a) of the Federal Rules of Appellate Procedure provides for en banc consideration in order to "...Secure or maintain uniformity..." of decisions. In this products' liability case, the panel has affirmed a summary judgment on the issue of "open and obvious" danger, notwithstanding established precedent against deciding such fact issues by summary judgment. We respectfully believe that the panel decision is inconsistent with previous rulings by this Court in *Lavespere v. Niagara Mach. & Tool Works, Inc.*, 910 F.2d 167 (5th Cir. 1990) and *Little v. Liquid Air*, 952 F.2d 841 (5th Cir. 1992), *en banc rehearing pending.* In *Lavespere, supra*, the panel deciding that case made it clear that summary judgments are rarely appropriate in this type of case, stating at 178:

> "...this court has consistently declared that 'the use of summary judgment is rarely appropriate in negligence or products liability cases, *even where the material facts are not disputed.*' "

In *Little v Liquid Air, supra;* which is pending before an en banc panel, this Court held at 847:

> "An inherently normative issue, such as whether

> a manufacturer has adequately warned a user that its product is hazardous, is not generally susceptible to summary judgment."

And while we recognize that our case involves seller liability, we believe the consistent teaching of the Fifth Circuit has been *against* the granting of summary judgments in products liability cases, particularly on issues of fact such as those set forth hereinabove. The panel's reliance on *Melton v. Deere,* 887 F.2d 1241 (5th Cir. 1989) is particularly misplaced because there, the vertical unloader *did* have a warning sticker next to the access door. At 1242, the decision begins by noting:

> "At times the grain tank and unloading system must be cleaned out. For this purpose, a five-by-five-inch opening is located at the bottom of the vertical unloader, covered by a door. Immediately above the door is affixed a decal:
>
> ! WARNING
> To avoid bodily injury from turning auger, stop engine and remove start key before opening clean out door.
>
> Another warning decal, located over a toolbox about two feet from the cleanout door, included the following instruction:
> 2. Disengage and shut off all engine and/or motor power before servicing or unclogging machine."

If the warning stickers which are shown at page 8 of this application had been utilized, then the decision of the panel would have been consistent with *Melston, supra,* and

the cases it relied upon. But the warning stickers were not used!!

(b) Failure at the Threshold. It is also the uniform rule of the Fifth Circuit and of the United States Supreme Court that the mover for summary judgment has the threshold burden of establishing those facts as to which there is no issue. Because Industrial did *not* certify the issue of "open and obvious" danger in its Rule 2.09 Statement of Uncontested Facts, it did not bear its threshold burden as required by *Celotex v. Catrett,* 477 U.S. 317, 106 S. Ct. 2548, 91 L.Ed.2d 265 (1986) and its considerable progeny. To the best of our knowledge, no Fifth Circuit decision has ever allowed a fact issue *not set forth in the Rule 2.09 Certificate* to be "supplied" by the Court. Uniformity requires that a non-mover to a summary judgment be put on *clear notice* as to what fact issues are "uncontested".

(c) Questions of Exceptional Importance. We do not know what issues the en banc panel is presently considering in *Little v. Liquid Air, supra.* Based on our monitoring of the case and our conversations with counsel involved, we believe that the en banc panel is presently considering in *Little v. Liquid Air, supra.* Based on our monitoring of the case and our conversations with counsel involved, we believe that the en banc panel is concerned with (a) the application of the facts in that case to a summary judgment, (b) the "sophisticated user" rule and/or (c) the applicability of the "risk/utility" doctrine, recently made the subject of two Mississippi Supreme Court decisions, *Swan v. I.P., Inc.,* Cause No. 89-CA-1255) and *Sperry-New Holland, Division of Sperry Corp. v. Prestage,* (Case No. 90-CA-0657).

We submit that this case presents similar issues which the en banc panel has found important in *Little v. Liquid Air.* The Demeres were extremely unsophisticated and, on remand, the "sophisticated user" doctrine would have to be dealt with in accordance with this Court's ruling in *Davis v. Avondale Industries, supra.* This "risk/utility" doctrine was not at all developed. The recent national trend toward the application of the "risk/utility" doctrine requires that the issues in this case be weighed risk-against-utility.[8]

(d) The Lethality of Screw-type Augers. The lethality of screw-type augers is a matter of *national concern.* We believed that the "Jet Wheel" doctrine applied and so moved, *in limine.* The District Court granted our motion but did not actually exclude evidence of "victim fault". The panel did not deal with the issue because it affirmed summary judgment. We believe that the application of the "Jet Wheel" doctrine to machinery as lethal as the auger involved herein is a matter of exceptional *societal* importance. In his 1982 presentation to the American Society of Agricultural Enginers, Mr. J.B. Sevart, P.E. quoting from the National Safety Council, noted that agriculture[9] was "*...the most dangerous occupation in the United States...*" (Excerpt 2, 000860), and *criticized* the industry argument that safety would be best insured by (a) providing warnings and (b) instructing operators to turn the machine OFF

---

[8] The reason workers had to enter the bin was because the entire system did not work properly. Thus, the "utility" was minimal as opposed to the grave risk involved.

[9] The orbital bin at issue was typically used to convey grain, but had been adapted to convey ice by Rochester Silo.

when leaving the operator position (000861). In criticizing this utopian concept, Mr. Sevart's research paper noted that the strategy had failed miserably "...to reduce the number and severity of the injuries associated with agricultural equipment..." (000862). Regarding the foreseeability of what happened to Jack Kelley, Mr. Sevart wrote, as follows:

> "No human operator can be expected to be one hundred percent perfect. Who hasn't run a stop sign or a red light even though he had traveled the route many times and in fact, the number of times the route had been traveled may be a dominant factor in the incident. *It is most foreseeable that boredom, fatigue, worry, inexperience,*[10] *and a host of other factors deny the existence of the perfect operator.*"

In the remainder of his paper, Mr. Sevart suggested the use of interlocks, dead-man controls, and emergency stops, all of which were available when *this* ice plant was assembled in Lafourche Parish in 1987. Detailed references to national publications were included in our original brief to the panel, pp 21 - 26. For the convenience of the members of the Court, we annex as Appendix "B" and Appendix "C" literature which we submitted to the District Court in connection with our "Jet Wheel" motion.

---

[10] In the case at bar, Jack Kelley was inexperienced with the perils of the auger:

(a) He wasn't there when the auger ate the shovel;

(b) when he worked inside the bin, the ice masked the danger (Excerpt 14). *See also,* Plaintiff's Exhibit "J" and

(c) when he was killed, it was, *at best*, Jack Kelley's second time inside the bin.

5. Conclusion. the issue of "open and obvious danger" was never properly presented. The District Court, we respectfully submit, was more involved with chastising Plaintiff's counsel because a deadline was missed then with the substantive rights of this widow and mother. The panel gravely erred in affirming summary judgment under these complex set of facts. We respectfully request en banc reconsideration.

Respectfully submitted:

/s/ Henry L. Klein
HENRY L. KLEIN, ESQ.
Bar No. 7440
844 Baronne Street
New Orleans, LA 70113-1103
(504) 586-9971

CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing pleading has been served on all counsel of record by hand delivery, FAX and/or by depositing same into the United States Mail, properly addressed and postage prepaid on this 14th day of July, 1993.

Henry L. Klein